

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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LEOBARDO VERDIN,

Plaintiff,

MEMORANDUM AND ORDER

97-CV-1044 (ILG)

-against-

THE CITY OF NEW YORK, P.O.  
LISA WEBB and P.O. BYRON  
MURTHA,

Defendants.

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GLASSER, United States District Judge:

This is a civil rights action brought by plaintiff Leobardo Verdin ("Verdin") under 42 U.S.C. § 1983 against the City of New York, Police Officer Lisa Webb ("Webb") and Police Officer Byron Murtha ("Murtha"). Verdin alleges his constitutional rights were violated because he was assaulted and falsely arrested. Defendants now move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For the following reasons, defendants' motion is granted.

FACTS<sup>1</sup>

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<sup>1</sup> Plaintiff has not submitted a Statement of Material Facts and, in accordance with Local Civil Rule 56.1, those assertions contained in defendants' 56.1 Statement are therefore deemed admitted. See Local Civil Rule 56.1 (c) of the Local Rules of the Eastern District of New York ("All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.").

The events giving rise to the Complaint begin with the February 29, 1996 arrest of Verdin for driving without a license. On that date, Police Officers Webb and Murtha responded to a report of a car accident at which time plaintiff identified himself as the driver of one of the vehicles involved. Def. 56.1 at ¶¶ 1-2. Upon checking the status of plaintiff's driver's license with the Department of Motor Vehicles, Murtha Dep. at 35, Murtha learned that plaintiff's license was suspended. Def. 56.1 at ¶ 4; see also DMV Driving Record, Ex. D to Cohen Dec. Verdin was then handcuffed, arrested and transported to the 75<sup>th</sup> Police Precinct where he was detained until his release on March 1, 1996. Def. 56.1 at ¶¶ 6-7, 10.

On March 3, 1997, plaintiff filed this lawsuit, asserting the following causes of action: violations of 42 U.S.C. § 1983; assault; battery; false arrest; negligence and municipal liability. Verdin alleges that Murtha and Webb had no probable cause to arrest him and that they "violently grabbed and handcuffed [him]," Compl. at ¶ 16, resulting in physical injury to his wrist as well as mental injuries. Prompted by the insistence of his attorney, Verdin received medical attention for his alleged wrist injury in February, 1997, a year following the incident, but has never sought medical treatment for his alleged mental injuries. Def. 56.1 at ¶¶ 12, 14.

## DISCUSSION

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. United States v. All Funds, 832 F. Supp. 542, 550-51 (E.D.N.Y. 1993).

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant who must demonstrate that a genuine issue of fact exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in his favor. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Once the nonmovant has adduced evidence of a genuine issue of material fact, his "allegations [will be] taken as true, and [he] will receive the benefit of the doubt when [his] assertions

conflict with those of the movant." Samuels v. J. Mockry, et al., 77 F.3d 34, 36 (2d Cir. 1996).

In support of their motion, defendants raise three arguments. First, they contend Murtha and Webb had probable cause to arrest Verdin, which precludes plaintiff's claim of false arrest. Second, defendants argue Murtha and Webb are entitled to qualified immunity with respect to their conduct, which precludes plaintiff's claim of excessive force. Finally, they submit they are entitled to summary judgment as to plaintiff's claim of municipal liability under Monell v. Dept. of Social Services, 436 U.S. 658 (1978). These contentions will be addressed *seriatim*.

I. Section 1983<sup>2</sup>

"Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." Sykes v. James, 13 F.3d 515, 519 (2d Cir.1993), cert. denied, 512 U.S. 1240, 114 S. Ct. 2749, 129 L.Ed.2d 867 (1994) (citing City of Oklahoma City v. Tuttle, 471 U.S. 808, 816, 105 S. Ct. 2427, 2432, 85 L.Ed.2d 791 (1985)). In order to state a claim under § 1983, a plaintiff must allege (1) that the challenged conduct was attributable at least in part to

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<sup>2</sup> 42 U.S.C. § 1983 provides in pertinent part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

a person acting under color of state law; and (2) that such conduct deprived the plaintiff of a right, privilege or immunity secured by the constitution or laws of the United States. See Rendell-Baker v. Kohn, 457 U.S. 830, 835 (1982).

a. False Arrest

Section 1983 protects citizens against deprivation of a right, privilege or immunity by a person acting under color of state law. A false arrest deprives a person of a liberty interest protected by the Constitution. See Simpson v. Saroff, 741 F. Supp. 1073 (S.D.N.Y. 1990). The elements of a false arrest claim under § 1983 are substantially the same as those under state law. Posr v. Doherty 944 F.2d 91, 96 (2d Cir. 1991). "To prove the elements of false arrest under New York law plaintiff must show: (1) the defendant intended to confine the plaintiff, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement and (4) the confinement was not otherwise privileged." Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994). An officer is privileged to make an arrest if he has probable cause to do so. See N.Y. Crim. Proc. § 140.10(1)(a) & (b) ("Arrest without a warrant; by police officer") ("a police officer may arrest a person [without a warrant] for a crime when he has reasonable cause to believe that such person has committed [a] crime. . . "). That is to say, the presence of probable cause is a complete defense to an action for false arrest. Zanghi v. Incorporated Village of Old Brookville, 752 F.2d 42, 45 (2d Cir. 1991). The test for determining probable cause was

described in Calamia v. City of New York, 879 F.2d 1025, 1032 (2d Cir. 1989):

In general, probable cause to arrest exists when the authorities have knowledge or reasonably trustworthy information sufficient to warrant a person of reasonable caution in the belief that an offense has been committed by the person to be arrested. The existence of probable cause must be determined on the basis of the totality of the circumstances . . . .

Calamia, 879 F.2d at 1032. See also Woodard v. Stardenfelder, 845 F. Supp. 960, 967 (E.D.N.Y. 1994) ("[P]robable cause exists if the circumstances known to the officer are sufficient where officer receives 'information from some person-- normally the putative victim or eyewitness--who it seems reasonable to believe is telling the truth.'" ) (quoting Thomas v. Culberg, 741 F. Supp. 77, 80 (S.D.N.Y. 1990)). Thus, even "[a]ssuming the information ... relied upon was wrong, probable cause exists even where it is based upon mistaken information, so long as the arresting officer was reasonable in relying on that information." Bernard, 25 F.3d at 203 (citing Colon v. City of N.Y., 468 N.Y.S.2d 453, 455-56 (1983)).

Defendants have established that probable cause existed for Verdin's arrest. Verdin's failure to produce a valid driver's license at the accident scene prompted Murtha to inquire with the Department of Motor Vehicles as to the status of Verdin's license. Murtha Dep. at 35. When Murtha was advised by "the DMV [that] said license was suspended," Verdin was then arrested for driving with a suspended driver's license, or "aggravated

unlicensed operation of a motor vehicle," a third degree misdemeanor. See N.Y. Veh. & Traf. Law § 511 (McKinney 1996). Murtha's inquiry with the DMV provided the "reasonably trustworthy information sufficient to warrant . . . [his] . . . belief that an offense [had] been committed by [Verdin]." Calamia, 879 F.2d at 1032.

At oral argument, plaintiff's counsel contested that plaintiff's license was suspended on the date of the incident and argued that plaintiff was never told the grounds for his arrest. The record indicates otherwise. When asked why he was being arrested, Verdin replied "because my driver's license was false and my insurance papers were also false." Verdin Dep. at 19-20. Furthermore, Department of Motor Vehicles records confirm plaintiff's license was indeed suspended on February 29, 1996, the date of the incident. See Ex. D to Cohen Dec.

Other than his own conclusory allegations that "he was the holder and bearer of a valid driver's license" at the time of the accident, Arcia Aff. at ¶ 7, plaintiff fails to provide any evidence contradicting the existence of probable cause for his arrest. Because Verdin simply cannot rest on his own conclusory allegations and withstand a motion for summary judgment, see Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997),

defendants' motion as to his false arrest claim is granted.<sup>3</sup>

b. Qualified Immunity and Excessive Force<sup>4</sup>

In support of their motion for summary judgment, defendants also contend that Murtha and Webb are immune from plaintiff's claim for excessive force based on the defense of qualified immunity. See Finnegan v. Fountain, 915 F.2d 817, 822-23 (2d Cir. 1990) ("the qualified immunity defense is generally available against excessive force claims.").

Government officials performing discretionary functions "enjoy qualified immunity that shields them from personal liability under section 1983 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known,' Harlow v. Fitzgerald, 457 U.S. 800 (1982) . . . , or insofar as it was objectively reasonable for them to believe that their acts did

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<sup>3</sup> Although defendants also argue they are entitled to summary judgment on plaintiff's claim for false imprisonment on this basis, no such cause of action is pleaded in the complaint. However, even if it is to be assumed that plaintiff has included a claim for false imprisonment, the result would be the same. See Simpson v. Saroff, 741 F. Supp. 1073 (S.D.N.Y. 1990) (the presence of probable cause is also a complete defense to an action for false imprisonment.)

<sup>4</sup> Although plaintiff's Complaint alleges a cause of action for assault, this claim will be construed as a claim of excessive force in violation of the Fourth Amendment's Due Process Clause to support his § 1983 claim.

not violate those rights, see Anderson v. Creighton, 483 U.S. 635, 638-39 (1987) . . . " Velardi v. Walsh, 40 F.3d 569, 573 (2d Cir. 1994) (citations omitted). Plaintiff here alleges that defendants "violently grabbed and handcuffed [him]," Compl. at ¶ 16, complaining he was pushed into the car and his handcuffs were made too tight. Verdin Dep. at 26-27, 29. Notably, plaintiff did not seek medical attention for nearly one year after the incident and only upon the urging of counsel. Def. 56.1 at ¶ 14.

New York's Penal Law specifically authorizes the use of reasonable force in effecting an arrest. See N.Y. Penal Law § 35.30 (McKinney 1998). Therefore, under these circumstances, it cannot be said that Murtha's actions in arresting Verdin were objectively unreasonable.

Nor do Verdin's allegations that his handcuffs were too tight constitute excessive force. See Brumfield v. Jones, 849 F.2d 152, 156 (5th Cir. 1988) (handcuffs which cause discomfort does not constitute excessive force); Foster v. Metro. Airports Comm'n, 914 F.2d 1076 (8<sup>th</sup> Cir. 1990) (allegations of pain from tight handcuffs, without evidence of permanent injury, insufficient to support claim of excessive force); Van Houten v. Baughman, 663 F. Supp. 887, 981 (C.D. Ill. 1987) (pain in wrist and numbness in hand resulting from handcuffing was not severe injury to support § 1983 claim). As the Supreme Court has noted,

not every push or shove constitutes excessive force. Graham v. Connor, 490 U.S. 386, 396 (1989).

Although the injuries suffered need not be permanent or severe to recover under an excessive force claim, see Robinson v. Via, 821 F.2d 913, 924 (2d Cir. 1987), Verdin does not submit any evidence relating to his injury to create a genuine issue for trial. As such, defendants' motion for summary judgment on plaintiff's claim of excessive force is granted as to Webb and Murtha on the grounds of qualified immunity.

c. Municipal Liability Under § 1983

Nor can plaintiff state a claim for municipal liability under Monell v. Dept. of Social Services, 436 U.S. 658 (1978). When a plaintiff seeks to subject a municipality to § 1983 liability, he must allege that the violation of his constitutional rights resulted from a municipal policy or custom. Monell v. Dept. of Social Services, 436 U.S. 658 (1978). "Though this does not mean that the plaintiff must show that the municipality had an explicitly stated rule or regulation, a single incident alleged in a complaint, especially if it involved only actors below the policy making level, does not suffice to show a municipal policy." Ricciuti v. N.Y.C. Transit Auth., 941 F.2d 119, 123 (2d Cir. 1991). While it is recognized that plaintiff need not prove his claims through his pleadings since

much of the proof will be developed in the discovery process, Colburn v. Upper Darby Tp., 838 F.2d 663, 666 (3d Cir. 1988), cert. denied 489 U.S. 658 (1989), a § 1983 complaint will not stand on the basis of vague and conclusory assertions. Alfaro Motors, Inc. v. Ward, 814 F.2d 883, 887 (2d Cir.1987).

Plaintiff has adduced no evidence that such a policy or practice existed beyond his conclusory allegations that the City has engaged in wrongful practices in the past and that the City has failed to train its employees, Complaint at ¶¶ 41-42. As defendant rightly points out, "[c]onclusory allegations by a plaintiff of a municipality's pattern or policy of unconstitutional behavior are insufficient to establish a Monell claim, absent the production of evidence to back up such an allegation." Woo v. City of New York, 1996 U.S. Dist. LEXIS 11689, \*14-15 (S.D.N.Y. August 12, 1996). As stated earlier, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Because plaintiff has failed to interpose a genuine issue of fact, defendants' motion for summary judgment as to plaintiff's claim for municipal liability under § 1983 is granted.

## II. Pendant State Claims

Having determined that defendants' are entitled to summary judgment on plaintiff's federal claims, plaintiff's supplemental state claims of assault, battery, false arrest and negligence should be dismissed as well. See United States Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.")

### CONCLUSION

For the foregoing reasons, defendants' motion for summary judgement should be granted.

SO ORDERED.



United States District Judge

Dated: Brooklyn, New York  
October 26<sup>th</sup> 1998

Copies of the foregoing Memorandum and Order were this day sent to:

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